Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

MIAMI UNIVERSITY,

Petitioner,

vs.

STATE OF OHIO, *ex rel. The Miami Student,*

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Supreme Court of the State of Ohio supersede the provisions of the Family Education Rights and Privacy Act (20 U.S.C.A. § 1232g) by ordering a public university to disclose the contents of students' education records under Ohio's "open records law" (§ 149.43, Ohio Revised Code)?

2. Has federal law pre-empted the states' rights to enact laws that would require disclosure of a public university's students' disciplinary records?

3. Do students of public universities have a constitutional right of privacy of all of their education records, including records of university disciplinary proceedings?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the former editors of *The Miami Student* (Miami University's student newspaper), Jennifer Markiewicz and Emily Hebert, the Board of Trustees of Miami University, the Miami University Disciplinary Board, Myrtis Powell, Vice President for Student Affairs, and Mary Link, Chair of the Miami University Disciplinary Board, were parties in the original action in mandamus filed in the Supreme Court of Ohio.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at *State ex rel. The Miami Student v. Miami University*, 79 Ohio St. 3d 168 (1997) (App. A). This was an original action in mandamus commenced in that court by the Respondents.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 9, 1997. (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, provides:

> (a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions.

* * * *

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which —

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

* * * *

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping. (1) no funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization. . . .

Ohio Revised Code, § 149.43 (Page's 1994) (the Ohio Public Records Act) provided[1]:

> (A) As used in this section:
>
> (1) "Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, except . . . records the release of which is prohibited by state or federal law.

United States Constitution, Amendment 4 provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The fundamental question is whether a state court, acting under that state's public records laws, may compel a public university to disclose personally identifiable information contained in education records of its students in violation of a federal statute that prohibits such disclosure. The specific records

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1. This statute was amended effective July 1, 1997, but the substance of the statute remains unchanged, *i.e.*, "public record" does not mean "records the release of which is prohibited by state or federal law." R.C. § 149.43(A)(o) (Page's 1996).

at issue in this case are certain of the Miami University's disciplinary board records. The holding of the Ohio Supreme Court finds that the university disciplinary records are not "education records" under federal law and, therefore, must be disclosed when a public records request is made to the university for those records. The Ohio Supreme Court granted a writ of mandamus against Miami University, which compels it to turn over to the student newspaper certain student disciplinary records requested by Respondents. After the Ohio Supreme Court's decision was issued, Miami University received an amended records request from Respondents, as well as a broad public records request from *The Chronicle of Higher Education* for "all university disciplinary records." App. C. If Miami University adheres to the holding of the Ohio Supreme Court's decision and responds to these public records requests, Miami University will violate the Department of Education's unequivocal interpretation of federal law.

A. Background of the Mandamus Action.

After several informal discussions between the editors of the student newspaper throughout 1995, *The Miami Student* ("the newspaper"), and officials of Miami University (sometimes "the University") involving public access to the University's disciplinary board's records, a formal, written request was submitted by an attorney for the newspaper on March 11, 1996. The request was directed to the Vice President for Student Affairs of the University and was made pursuant to Ohio Revised Code § 149.43. The newspaper requested "all records kept by Miami University reflecting the disposition of cases of student misconduct by the University Disciplinary Board during the academic years 1993 to 1994, 1994 to 1995, and 1995 to 1996" (the "Records").

Miami University is a public institution of higher learning as defined in 20 U.S.C. § 1232g(3), the Family Educational

Rights and Privacy Act ("FERPA"). Miami University receives more than $40,000,000 annually under programs administered by the Secretary of the United States Department of Education ("DOE"). FERPA provides that if a public institution, such as Miami University, was to establish a policy or practice of publicly disclosing personally identifiable information contained in the "education records" of a student without that student's consent, that the Secretary of the DOE *shall* take those federally administered funds away from that university. 20 U.S.C.A. § 1232g(b). The Secretary of the DOE has specifically opined that the internal disciplinary records of a public institution are included within the statutory term "education records." The Family Educational Rights and Privacy Act, 60 Fed. Reg. 3464, 3465 (Jan. 17, 1995). And in fact, FERPA regulations were amended in 1995 to specifically add a definition of "disciplinary action," and to distinguish those records from "law enforcement records," which are not protected from disclosure by FERPA. 34 C.F.R. 99.3 (1995). The only information which FERPA permits to be disclosed to the public from a student's education records is that which is not "personally identifiable."

In response to the newspaper's request of March 11, 1996, Miami University provided numerous statistical summaries of the proceedings of the University Disciplinary Board ("UDB") for the three years requested, as well as copies of the actual decisions of the UDB and the correspondence between the University and the student regarding the disciplinary proceedings. Prior to that production of records, Miami University redacted all personally identifiable information, such as names of parties and witnesses, social security or student ID numbers, addresses, dates, times and locations of occurrences, and other details which it believed could make the identity of the student being charged with misconduct "easily traceable."[2]

2. FERPA regulations define "personally identifiable information" to include "information that would make the student's identity easily traceable." 34 C.F.R. § 99.3.

The newspaper believed that the information provided to it was inadequate and that Miami University was required by Ohio law to provide the complete records of the UDB proceedings. While the newspaper maintained that FERPA did not prohibit the release of the disciplinary records, it did agree that the names, social security number or student ID number of the convicted party could be redacted. Miami University responded that it had provided all of the information that it could without violating FERPA.

B. The Proceedings Below.

The then immediate-past and the then current editors of the newspaper commenced an original action in the Supreme Court of Ohio for mandamus against Miami University and certain of its officials on July 9, 1996. That court did not conduct an evidentiary hearing, but it required the parties to file all pertinent evidence with it by November 12, 1996. Certain depositions of the parties were filed, together with copies of all of the records at issue, both redacted and, under seal, the unredacted documents.

The Ohio Supreme Court heard oral arguments from counsel on January 21, 1997. On July 9, 1997, it rendered its decision: "... We hold that university disciplinary records are not 'education records' under the federal law, FERPA," *Miami* at 172. A writ of mandamus was issued on that date, in which Miami University was ordered to provide all of the records of the UDB subject to the newspaper's own request. The Ohio Supreme Court stated:

> Since the release of the requested UDB records is not exempt from disclosure under R.C. 149.43(A)(1), respondents are required to comply with relators' public records

> request. In their request for university disciplinary proceeding records, relators informed the university that they need not disclose personal information regarding the students, such as their name, Social Security Number, student identification number, or other information that conveys the identity of the accused or convicted party. . . . The university must disclose however, the general location of the incident, the age and sex of the student (which does not identify the student), the nature of the offense, and the type of disciplinary penalty imposed.

Miami at 172. The court also ordered Miami University to pay the attorney fees incurred by the newspaper. *Miami* at 173.

Subsequent to that ruling, the newspaper expanded its request for the records to include the date, class, gender, race, age, violation and outcome of the disciplinary proceedings. App. C. Additionally, *The Chronicle of Higher Education* has requested **all** of the University's disciplinary records with **no** redactions. App. C. A Motion to Stay Pending Appeal was filed by Petitioners with the Supreme Court of Ohio on September 19, 1997.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Ohio Supreme Court Decision Attempts to Supersede Federal Law.

By holding that university disciplinary records are not "education records" under FERPA, the Supreme Court of Ohio has:

(1) interpreted FERPA in a manner that violates the clear Congressional intent of protecting the privacy of personally identifiable information contained in education records[3];

(2) violated the express language of FERPA's regulations, which includes "disciplinary records" within the definition of "education records"[4];

(3) failed to give due deference to the interpretation by the Secretary of the DOE of the FERPA regulations; and

(4) placed at jeopardy the more than $40,000,000 of federal funds provided annually to Miami University by the DOE, and through *stare decisis*, the hundreds of millions of dollars received by students attending all of Ohio's 22 public institutions of higher learning.

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3. 120 Con. Rec. 39861, 39862 (Dec. 13, 1974).

4. 34 C.F.R. § 99.3 (1995).

The federal funding received by Miami University is in large part channeled to the University's students in the form of financial aid and grants. Due to the profound impact this decision may have upon the students who rely on federal grants and other funds to attend public colleges and universities throughout Ohio and other jurisdictions, it is critical that this Court settle this important question of federal law. Only then will students in all states know what records are protected from public disclosure by FERPA.

The Ohio Supreme Court's decision fails to recognize that Congress has pre-empted this area from the states when it passed FERPA in the early 1970s:

> No funds shall be made available under any applicable program to any education or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency or organization. . . . 20 U.S.C.A. § 1232g(b).

Education records are defined as those records: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 34 C.F.R. § 99.3 (1995).

As Ohio Supreme Court Justice Lundberg Stratton noted in her dissent:

> Under FERPA, the statutory definition of "education records" is all-inclusive, covering "those records, files, documents, and other

> materials, which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." Section 1232g(a)(4)(A), Title 20, U.S. Code.
>
> FERPA threatens the loss of federal funds for a policy or practice of disclosure of education records. The majority finds that disciplinary records are not education records. However, I believe this finding is clearly contrary to the history, language and intent of FERPA, and is well documented by the Secretary of Education in promulgating the regulations implementing FERPA. Therefore, I believe we have no choice, despite my strong support for the value of open records in our society, but to follow Congress's dictates.

Miami at 174.

1. The Ohio Supreme Court Misinterpreted FERPA.

In an effort to clarify the DOE's position following the decision in *Red and Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia*, 262 Ga. 848, 427 S.E. 2d 257 (1993)[5], the Secretary of DOE officially pronounced that "the records of an institution's disciplinary action or proceeding are 'education records' under FERPA . . . ." 60 Fed. Reg. 3464 (January 17, 1995). Congress amended FERPA in January, 1995, to provide

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5. Which held, *prior* to the 1995 amendments to the FERPA regulations, that records sought regarding infractions allegedly committed by fraternities (not individual students) were not "education records."

that law enforcement records were not included in the term "education records," but Congress did not exclude "disciplinary records." The Secretary recognized the distinction between law enforcement and disciplinary records and reiterated that the internal disciplinary process was protected from public disclosure under FERPA even if the records of the university police department were not. *Id.* at 3465.

The Supreme Court of Ohio relied solely on cases that interpreted FERPA prior to 1995 when it held "university disciplinary records are not 'education records' as defined in FERPA." *Miami* at 172. That court proceeded to order disclosure of the disciplinary records under Ohio's public records act even though that act provides for an exception for records "the release of which is prohibited by state or federal law." Ohio Revised Code § 149.43(A)(1)[6]. Acting solely on the erroneous belief that FERPA encompassed only concepts of academic, scholastic or financial records in its definition of "educational records," the Ohio court circumvented the FERPA prohibition against disclosure by excluding disciplinary records from the definition of "education records." *Id.*

2. The Ohio Supreme Court Failed to Give Due Deference to the Interpretation by the Secretary of the DOE.

In comments to the 1995 amendments to FERPA, the Secretary of the DOE specifically stated that "all disciplinary records, including those related to non-academic or criminal misconduct by students, are 'education records' subject to FERPA." 60 Fed. Reg. at 3465. When interpreting statutes, courts are required to give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which agency Congress has

6. Now R.C. § 149.43(A)(1)(o).

delegated the responsibility of implementing the Congressional command. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Secretary of the DOE's interpretation is unequivocal. University disciplinary records are education records under FERPA, and this interpretation is the antithesis of the Supreme Court of Ohio's interpretation in *Miami*. This places Petitioners in an untenable position especially in light of recent requests for university disciplinary records.

B. Federal Law Pre-Empts the State Statute.

Federal law may pre-empt a state statute when there is an actual conflict between the provisions. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). One manner in which a state law may actually conflict with a federal statute is if it frustrates the purpose of the federal legislation. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

FERPA, by prohibiting the release of personally identifiable information related to any student, seeks to protect students' privacy interests and education records. 120 Cong. Rec. at 39861, 39862 (December 13, 1974). This court's holding that university disciplinary records are not "education records" under FERPA, and therefore subject to disclosure pursuant to R.C. § 149.43, clearly contravenes FERPA's stated purpose — the protection of students' rights to privacy in their education records. FERPA clearly pre-empts the state statute.

C. Students at Ohio's Public Universities Have a Constitutional Right of Privacy in Their Education Records.

FERPA establishes a reasonable expectation of privacy in education records. The purpose of FERPA is to ensure access to education records for students and parents, while protecting the privacy of such records. 120 Con. Rec. at 39862. Two different

kinds of interests must be considered in any discussion regarding the protection of privacy interests: one is the individual interest in avoiding disclosure of personal matters, and the other is the interest in independence in making certain kinds of important decisions. *Whelan v. Roe*, 429 U.S. 589, 598-600 (1977).

In *Florida State University v. Hatton*, 672 So. 2d 567 (Fla. App. 1 Dist. 1996), it was held that the interest of a state university student in obtaining confidential documents consisting of formal orders applying to all student conduct code cases was outweighed by the substantial privacy interest in the documents which the legislature accorded students and their parents by statute, and the interest of the university in avoiding penalties which might have ensued from disclosure. The *Florida State University* court found guidance in FERPA's definition of "personally identifiable information" in 34 C.F.R. § 99.3, and held that the hearing officer in that case abused his discretion by requiring the university to produce redacted, confidential student records.

Students of public universities may suffer irreparable harm because once information is released, it cannot be retracted. Victims of student misconduct, including victims of sexual assault and those students who have been wrongfully accused, will have their privacy invaded. Individuals whose rights have been violated may have a private right of action against the university or its officials for violation of FERPA under 42 U.S.C. § 1983. *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport* (March 4, 1994), Case No. 393, 332, First Jud. Dist. Ct., Caddo Parish, La., *citing Norwood v. Slammons*, 788 F. Supp. 1020 (W.D. Ark. 1991). Once information is released, it can never be recaptured and made private.

In this case, the public's interest in obtaining information

must be weighed against the harm caused by the invasion of privacy resulting from the release of that information. FERPA establishes an expectation of privacy in education records, and the Ohio Supreme Court's decision in this case requires Miami University to violate that constitutionally protected privacy interest.

CONCLUSION

Miami University is confronted with a Hobson's choice. It can follow the mandate of FERPA by withholding the public disclosure of student disciplinary records, and if it does, it will be violating the order of Ohio's highest court. Or it can follow the order of the Ohio Supreme Court by disclosing disciplinary records and run the risk of violating FERPA. If it does the latter, Miami University could lose millions of dollars of federal assistance. Either way, Miami University and its students (and potentially all other public schools in Ohio) will be exposed to future litigation — either by parties seeking records or by the DOE or students seeking a protection of their privacy. The interests of educators, students, news organizations, the federal DOE and the public at large will be served best by the United States Supreme Court's interpretation of FERPA and its resolution of this federal-state conflict. If the decision of the Ohio Supreme Court is permitted to stand as precedent of the meaning of "education records" under FERPA, much of the privacy that Congress granted to students and their families will be lost through the state court's interpretative process.

This case presents the issue squarely to this Court for the first time — are the disciplinary records of students which are maintained by public universities protected from public disclosure by the Family Education Rights and Privacy Act? A decision which upholds the Congressional intent of this legislation is sorely needed to avoid a patchwork of state court

opinions under various state public record or freedom of information laws. The shortest path to uniformity is through this Court.

Respectfully submitted,

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APPENDIX A — DECISION OF THE SUPREME COURT OF OHIO DECIDED JULY 9, 1997

Moyer, C.J., Douglas, Resnick, F.E. Sweeney And Pfeifer, JJ., concur.

Cook and Lundberg Stratton, JJ., dissent and would require applicant to wait and reapply for the July 1998 bar examination.

The State ex rel. The Miami Student et al. *v.* Miami University et al.

[Cite as *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St.3d 168.]

Mandamus to compel Miami University to provide records of student disciplinary proceedings held before the University Disciplinary Board to the university's student newspaper — Writ granted, when.

(No. 96-1596 — Submitted January 21, 1997 — Decided July 9, 1997.)

IN MANDAMUS.

In the spring of 1995, relator Jennifer Markiewicz, then editor in chief of Miami University's student newspaper, *The Miami Student*, sought records of student disciplinary proceedings held before the University Disciplinary Board ("UDB"). Markiewicz intended to use these records to develop a data base and to track student crime trends on campus. Initially, the university refused to provide Markiewicz with the requested records. Markiewicz, and her successor editor in chief, relator Emily Hebert, then made a written request pursuant to R.C. 149.43, the Ohio Public Records Act, for all UDB records kept

in the years 1993-1996. In their letter, relators stated: "It is not a condition to this request that the subject records contain the name, social security number, student identification number, or other information that conveys the identity of any accused or convicted party. If this identifying information cannot be deleted from the aforementioned records, however, then the record[s] should be provided in their original form."

On April 5, 1996, Miami University released copies of UDB records. However, in reliance upon the confidentially provisions of the Family Educational Rights and Privacy Act ("FERPA"), Section 1232g(b), Title 20, U.S. Code, Miami officials deleted from these records the identity, sex, and age of the accuseds, as well as the date, time, and location of the incidents giving rise to the disciplinary charges. University officials also deleted certain internal memoranda, written statements prepared by students appealing adverse UDB decisions, and the disposition of certain proceedings.

Markiewicz and Hebert believed that the response to their public records request was inadequate and that Miami University was required to provide them with complete copies of the public records requested, redacted only with respect to the "name, social security number, or student I.D. number of any accused or convicted party." Since the university also deleted other information from the requested records, Markiewicz and Hebert filed an original mandamus action in this court against respondents, Miami University, Miami University Board of Trustees, University Disciplinary Board, Myrtis Powell, Vice President, Division of Student Affairs, and Mary Link, former Chair, University Disciplinary Board, seeking full disclosure of the UDB records requested.

Appendix A

The cause is now before this court for final disposition upon the evidence and briefs.

Sirkin, Pinales, Mezibov & Schwartz, Marc D. Mezibov and *Ted L. Wills,* for relators.

Betty D. Montgomery, Attorney General; *Draper, Hollenbaugh & Briscoe Co., L.P.A., Gerald L. Draper* and *Margaret R. Carmany,* for respondents.

Baker & Hostetler, Michael D. Dorich, David L. Marburger and *Lisa Hammond Johnson,* urging issuance of the writ of mandamus for *amicus curiae*, Ohio Coalition for Open Government.

Betty D. Montgomery, Attorney General; *Bricker & Eckler* and *Kurtis A. Tunnell*, urging denial of the writ of mandamus for *amicus curiae,* twenty-two Ohio public colleges and universities.

FRANCIS E. SWEENEY, SR., J. The issue before this court is whether relators are entitled to the requested records pertaining to Miami University Disciplinary Board proceedings for the years 1993-1996. Since we find that university disciplinary records are not "education records" under the federal law, FERPA relators are entitled to these records under R.C. 149.43 subject to relator's own request that personal information regarding the students be deleted. Accordingly, for the reasons that follow, we grant relators a writ of mandamus.

The Ohio Public Records Act is intended to be liberally construed "to ensure that governmental records be open and made available to the public * * * subject to only a few very

limited and narrow exceptions." *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St.3d 544, 549, 597 N.E.2d 147, 151. R.C. 149.43 therefore provides for full access to all public records upon request unless the requested records fall within one of the specific exceptions listed in the Act.

Respondents contend that the requested records fall under one such exception, found in former R.C. 149.43(A)(1), now (A)(1)(o). This section excludes from the definition of public records those records "the release of which is prohibited by state or federal law." In particular, respondents argue that the records sought are exempted from release under the federal law, FERPA.

Congress enacted FERPA, also known as the Buckley Amendment, in 1974. The Act was passed to provide access to educational records to students and parents while preventing educational institutions from carelessly releasing such information to the public. 88 Stat. 571, 572; 120 Congressional Record (1974) 39862-39866; *Bauer v. Kincaid* (W.D.Mo.1991), 759 F.Supp. 575, 589.

Section 1232g(b)(1), Title 20, U.S. Code provides:

"No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information * * *) of students without the written consent of their parents * * *."

Relators argue that FERPA is not an exception to Ohio's Public Records Act because the requested records are not

education records.[1] Therefore, the records sought are subject to release. The Act defines "education records" as those records that "contain information directly related to a student" and that are "maintained by an educational agency or institution." Section 1232g(4)(A), Title 20, U.S. Code.

In *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia* (1993), 262 Ga. 848, 427 S.E.2d 257, the Georgia Supreme Court was faced with the similar issue of whether FERPA restricts a public records request. In that case, the student newspaper at the University of Georgia sought access to records relating to the Organization Court of the Student Judiciary. The court initially questioned whether FERPA applies, since it does not actually prohibit the disclosure of records, but simply penalizes those educational institutions that engage in a policy or practice of disclosing such records by withdrawing that institution's federal funding. The court then held that FERPA does not prohibit the disclosure of such records. The court reasoned that the records sought, which involved infractions allegedly committed by fraternities, were not education records, since they did not relate to student academic performance, financial aid, or scholastic probation. In reliance upon this case, relators contend that respondents are likewise required to release the UDB records in their entirety because the records sought here do not involve academic performance, financial aid, or scholastic probation.

In deciding this issue, we are mindful that inherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it. Thus, the exceptions to disclosure are strictly

1. Relators make other arguments to support their position that the records do not fall within an exception to R.C. 149.43. However, we do not address these arguments since we find that FERPA is inapplicable on other grounds.

construed against the custodian of public records in order to promote this public policy. *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St.3d 168, 169, 637 N.E.2d 911, 912. Any doubt of whether to disclose public records is to be resolved in favor of providing access to such records. *State ex rel. The Warren Newspapers Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177.

With these principles in mind, we turn to the facts of this case. At Miami University, the University Disciplinary Board adjudicates cases involving infractions of student rules and regulations, such as underage drinking, but may also hear criminal matters, including physical and sexual assault offenses, which may or may not be turned over to local law enforcement agencies. Thus, the UDB proceedings are nonacademic in nature. The UDB records, therefore, do not contain educationally related information, such as grades or other academic data and are unrelated to academic performance, financial aid, or scholastic performance. Consequently, we adopt the reasoning of the *Red & Black* decision, *supra*, and hold that university disciplinary records are not "education records" as defined in FERPA.

Relators filed this complaint for a writ of mandamus in order to compile enough information from UDB hearings to effectively track crimes and student misconduct on campus. Respondents have prevented relators from accomplishing this task. By deleting relevant data, such as the general location of the alleged misconduct, and, in some instances, the type of punishment imposed, respondents have denied students at Miami University as well as the general public the right to obtain invaluable information, including when and where alleged offenses took place and how guilty offenders were punished.

Appendix A

Unfortunately, at present, crimes and other student misconduct are escalating at campuses across the nation. For potential students, and their parents, it is imperative that they are made aware of all campus crime statistics and other types of student misconduct in order to make an intelligent decision of which university to attend. Likewise, for students already enrolled in a university, their safety is of utmost importance. Without full public access to disciplinary proceeding records, that safety may be compromised. By our decision today, we believe we are following the dictates of R.C. 149.43, which is to foster openness and to encourage the free flow of information where it is not prohibited by law.

Since the release of the requested UDB records is not exempt from disclosure under R.C. 149.43(A)(1), respondents are required to comply with relators' public records request. In their request for university disciplinary proceeding records, relators informed the university that they need not disclose personal information regarding the students, such as their name, Social Security Number, student identification number, or other information that conveys the identity of the accused or convicted party. The university, however, not only deleted this information but also deleted the age and sex of the students charged with disciplinary violations, the dates, times, and locations of the incidents, and the disposition of certain proceedings. Although the university was warranted in deleting information that relators never sought, some of the information which it deleted was improperly withheld. Therefore, in accordance with relator's request, Miami University may delete from the UDB records the student's name, Social Security Number, and student identification number. The exact date and time of the alleged incident may also be deleted, since this constitutes other information that may lead to the identity of the student. The

university must disclose, however, the general location of the incident, the age and sex of the student (which does not identify the student), the nature of the offense, and the type of disciplinary penalty imposed.

Mandamus is the appropriate remedy to compel compliance with R.C. 149.43. *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 426, 639 N.E.2d 83, 88-89. Accordingly, we grant a writ of mandamus to compel respondents to provide the records specified above.

We also find that relators are entitled to attorney fees and costs. R.C. 149.43(C). Relators' counsel is instructed to submit a bill to document their request for attorney fees in accordance with DR 2-106. *State ex rel. The Plain Dealer Publishing Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 661 N.E.2d 187.

Writ granted.

MOYER, C.J., DOUGLAS, RESNICK and PFEIFER, JJ., concur

COOK, J., dissents in part and concurs in part.

LUNDBERG STRATTON J., dissents.

COOK, J., dissenting in part and concurring in part. I concur in Justice Lundberg Stratton's dissent but write separately to add the following observation. Miami University withheld by redaction information that should have been released. Review of the requested records shows that Miami University deleted the following information that was not personally identifiable, *i.e.*, information that would not be easily traceable to the

student's identity: the age and sex of the student, the general location of the incident, any description of the student's conduct leading to the disciplinary violation, and the severity of the sanction imposed. Respondent additionally withheld entire records on the basis that they contained personally identifiable information. However, these records also contain information, such as that listed above, that would not make the student's identity easily traceable. Therefore, I would grant a limited writ requiring disclosure of the records with only personally identifiable information deleted.

LUNDBERG STRATTON, J., dissenting. I respectfully dissent from the majority. I would find that the Family Educational Rights and Privacy Act ("FERPA") requires respondents to delete "personally identifiable information" from student disciplinary records. "Personally identifiable information" includes the name of a student or student's family member and "information that would make the student's identity easily traceable." Section 99.3, Title 34, C.F.R.

This court previously stated that Ohio's Public Record Act, at R.C. 149.43(A), expressly excludes records, the release of which would violate state or federal law. *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 607, 640 N.E.2d 164, 166. As federal law, FERPA provides:

> "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information * * *) of students

without the written consent of their parents * * *" Section 1232g(b)(1), Title 20, U.S. Code.

Under FERPA, the statutory definition of "education records" is all-inclusive, covering "those records, files, documents, and other materials, which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." Section 1232g(a)(4)(A), Title 20, U.S. Code.

FERPA threatens the loss of federal funds for a policy or practice of disclosure of education records. The majority finds that disciplinary records are not education records. However, I believe this finding is clearly contrary to the history, language and intent of FERPA, as is well documented by the Secretary of Education in promulgating the regulations implementing FERPA. Therefore, I believe we have no choice, despite my strong support for the value of open records in our society, but to follow Congress's dictates.

The majority primarily relies on *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia* (1993), 262 Ga. 848, 427 S.E.2d 257, as authority for concluding that the disciplinary records in dispute are subject to release because they are not education records and, consequently, not subject to FERPA. However, *Red & Black* was decided prior to the 1995 amendments to regulations implementing FERPA, in which the Secretary of Education clarified that disciplinary records were always included as education records under FERPA.

The 1995 amendments laid out a clear definition of "law

enforcement records," which the statute had specifically exempted from the disclosure prohibition:

"*Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to -

"(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution." Section 99.8(a)(1), Title 34, C.F.R.

Because the University Disciplinary Board is not a law enforcement unit, the law-enforcement exception to FERPA does not apply.

The Secretary of Education invited public comment before the amendments were promulgated. The Department of Education received over one hundred and fifty comments, with the majority of those responding stating that "to allow the release of student disciplinary records to the public without consent would compromise what they believe to be the fundamental educational mission of the campus judicial process." Some argued that "campus judicial systems have been effective in responding to violations of institutional policy because of the privacy protections afforded to students by FERPA." 60 F.R. 3464.

A minority of the comments dealt with the need to know about crime on campus. Concerning those comments, the Secretary stated, "[T]he issue of full public access to disciplinary hearing records concerning criminal and other non-academic misconduct is an important part of the ongoing debate concerning safety on college campuses and * * *, given the competing interest involved, these issues need to be aired and argued in the legislative arena." *Id.* As a result, the Secretary notified Congress of the need to address this important issue and offered to work with Congress in writing an appropriate amendment to FERPA. *Id.*

In explaining the 1995 amendments, the Secretary of Education acknowledged the holding in *Red & Black*, but noted that another state court more recently had reached the opposite conclusion, citing *Shreveport Professional Chapter of Soc. of Professional Journalists v. Louisiana State Univ., Shreveport* (Mar. 4, 1994), First Judicial District Court, Caddo Parish, La., No. 393,382, which found that student disciplinary records were *not* akin to law enforcement records and were education records.

Further, as in the *Shreveport* case, the relators argue that FERPA is not a law which prohibits disclosure, only that it provides for the withholding of federal funds for institutions that have a practice of releasing educational records. Regarding the question of whether FERPA prohibits not only funding but also disclosure, the court stated, "However, the intent of Congress to withhold millions of federal dollars from universities that violate [the] Buckley [Amendment] is ample prohibition, regardless of how the word 'prohibit' is construed by the plaintiffs." *Shreveport* at 17.

In addition, Section 1232g(b)(6), Title 20, U.S. Code permits

postsecondary institutions to disclose to a victim of a crime of violence the results of any disciplinary proceeding conducted by the institution against the perpetrator. The Secretary noted that this specific statutory exception to the prohibition of disclosure, enacted in 1990 as part of the Student Right-to-Know and Campus Security Act, P.L. 101-542, Section 203, 104 Stat. 2381, 2385, and implemented by Section 99.31(a)(13), Title 34, C.F.R., demonstrated Congress's view that disciplinary records are education records under FERPA. 60 F.R. 3465. Information about the type and the amount of crime on college campuses is also available under Section 668.47(a)(6), Title 34, C.F.R. (Student Assistance General Provisions), which implements the Student Right-to-Know and Campus Security Act, and requires postsecondary institutions to report annually statistics regarding certain campus crimes, including sexual assaults, that have been reported to local police agencies or to any official of the institution who has significant responsibility for student and campus activities. 60 F.R. 3465.

A federal administrative agency, the Department of Education, has definitively interpreted the issue of whether disciplinary records are education records. When interpreting statutes, courts must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which Congress has delegated the responsibility of implementing the congressional command. *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165.

The FERPA regulations leave no doubt that the records of the University Disciplinary Board are education records. In comments to the 1995 amendments, the Secretary of Education concluded:

Appendix A

"The Secretary remains legally constrained to conclude that records of an institution's disciplinary action or proceedings are 'education records' under FERPA, not law enforcement unit records, and that excluding these records from the definition of 'education records' can be accomplished only through a statutory amendment of FERPA by Congress." 60 F.R. 3464. Because their release is prohibited by federal law, as interpreted by a federal administrative agency, these records fall under the exception to release under Ohio's Public Records Act. R.C. 149.43(A).

Therefore, I would grant a limited writ, requiring disclosure of the records with any personally identifiable information, such as the name of the student, the date and time of the incident, or any other easily traceable information (*e.g.*, residence hall room numbers, names of roommates) deleted. Because most of these records have already been released with such deletions, I would deny attorney fees.

APPENDIX B — ORDER OF THE SUPREME COURT OF OHIO FILED JULY 9, 1997

THE SUPREME COURT OF OHIO

1997 TERM

Case No. 96-1596

State of Ohio ex rel. The Miami Student, Jennifer Markiewicz, and Emily Hebert,

Relators,

v.

Miami University, Board of Trustees of Miami University, et al.,

Respondents.

IN MANDAMUS

ENTRY

This cause originated in this Court on the filing of a complaint for a writ of mandamus and was considered in a manner prescribed by law. Upon consideration thereof,

IT IS ORDERED by the Court that, consistent with the opinion rendered herein, the writ of mandamus be, and hereby is, granted.

IT IS FURTHER ORDERED by the Court that relators' request for attorney fees be, and hereby is, granted.

Appendix B

IT IS FURTHER ORDERED by the Court that relators file a bill and documentation in support of their request for attorney fees, in accordance with the guidelines set forth in DR2-106, within 30 days of the date of this entry.

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C — SUBSEQUENT REQUESTS

THE CHRONICLE
OF HIGHER EDUCATION
1255 Twenty-Third Street, N.W. • Washington, D.C. 20037

July 14, 1997

Ms. Holly Wissing
Director of the News Bureau
Miami University
Fax No. 513-539-1950

Dear Ms. Wissing:

This request is made under the Ohio Public Records Act, R.C. 149.43.

Please send me copies of records of all disciplinary proceedings handled by the university's internal judicial system for calendar years 1995 and 1996. These include infractions of campus disciplinary codes, as well as criminal matters. We also would like copies of all internal memoranda and written statements filed in connection with proceedings and appeals.

As you know, the Ohio Supreme Court ruled July 9 that records of campus disciplinary hearings are public. The court found that documents from campus disciplinary proceedings are not "education records" as defined by the federal Family Educational Rights and Privacy Act (FERPA, or the Buckley Amendment.) The court also noted that records from campus disciplinary hearings do [sic] are not exempt from disclosure under the Ohio Public Records Act. The case was filed by the student newspaper at Miami.

Appendix C

The Chronicle would be glad to reimburse you for any reasonable costs associated with this request. If you have any questions, please contact me by phone at (202) 466-1058 or on the Internet at kit.lively@chronicle.com. If we don't hear from you within a reasonable time, as provided by law, I will call to follow up.

Thanks in advance for your help.

Sincerely

s/ Kit Lively
(Ms.) Kit Lively
Senior Editor for Special Projects

Appendix C

Aug. 15, 1997

Richard Little
University Communications
Miami University
Fax: 513-529-2121

Dear Richard:

I wanted to recap our Aug. 14 phone discussion regarding The Chronicle's request for records of disciplinary proceedings from calendar years 1995 and 1996.

We are willing to start the process by looking at the complete records for November 1995 and 1996. This does not mean we are dropping our original full request, but I hope narrowing the first step will make the job more manageable.

Since the Ohio Supreme Court ruled that these records are not covered by FERPA, we are requesting them with names intact. The Chronicle has a policy of not printing the names of victims of sex crimes without their permission. We also will not use students' social security numbers that appear in the records. We realize that Ohio laws also prohibit the disclosure of other information, such as attorney-client communications and medical records, and understand that you will redact that information.

We are requesting access to as much information as possible because we plan to provide a window into how the internal disciplinary system works. We don't intend to print lists of names but having names will enable us to contact people involved to get a fuller picture. We also want the story to tell how many

cases the judiciary handles and the various kinds of violations that end up there.

Please let us know as soon as possible how long it will take to prepare the records and when they will be ready for us to inspect.

If you have questions I can be reached by phone at 202-466-1058, or on the Internet at kit.lively@chronicle.com. I will be on vacation the week of Aug. 18-22. If you have questions during that week about our request or if you have information about when the records will be ready you can call Scott Jaschik, the deputy managing editor, at 202-466-1005.

Thanks again for your time and willingness to work with us on this.

Sincerely,

s/ Kit Lively
Kit Lively
Senior Editor for Special Projects

Appendix C

MIAMI UNIVERSITY

The Miami Student
6 MacMillan Hall
Oxford, OH 45056
513.529.2210
513.529.1893 FAX

TO: Susan Vaughn
Director of Judicial Affairs

FR: Melissa Baker
Editor-in-Chief

DA: September 5, 1997

RE: University disciplinary records

The Miami Student officially requests, in accordance with the Ohio Supreme Court decision on July 9, 1997, release of University Disciplinary Board records excluding names, Social Security Numbers and student identification numbers to the student newspaper.

Please release records of disciplinary proceedings to *The Miami Student*. These records should reflect the date, class, gender, race, age, violation and outcome of the disciplinary proceedings.

s/ Melissa S. Baker
Melissa S. Baker
Editor-in-Chief

cc: Marc Mezibov, Relator Attorney
Richard Little, Senior Director of University Communications
James Garland, President
Dennis P. Walsh, Adviser
Jennifer Markiewicz
Emily Hebert
file

(2)

Supreme Court, U.S.
FILED
NOV 6 1997
CLERK

No. 97-606

In The

Supreme Court of the United States

October Term, 1997

MIAMI UNIVERSITY,

Petitioner,

vs.

STATE OF OHIO, *ex rel. The Miami Student,*

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

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STATEMENT OF THE CASE

In the spring of 1995, The Student (the newspaper), the student newspaper of Miami University of Ohio, (Miami) attempted to obtain records of student disciplinary proceedings held before Miami's disciplinary board (UDB). The newspaper was requesting the records in order to compile a database containing statistical information relating to issues of crime and punishment on the Miami campus. The newspaper made clear that Miami's compliance with the request for records need not contain any personally identifiable information, *i.e.* a student's name, social security number or a student identification number. Miami refused to provide the records requested by the newspaper essentially for the purported reason that to do so would violate Miami's obligations under provisions of the Federal Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g). FERPA, among other things, protects the release of "education records" containing personally identifiable information of students. 20 U.S.C. § 1232(g)(b)(2). When Miami failed to provide these records, even subject to the newspaper's clarification that personally identifiable information could be deleted from the records, the newspaper brought an original action in mandamus in the Supreme Court of Ohio pursuant to the Ohio Public Records Act, R.C. 149.43.

On July 9, 1997, the Supreme Court of Ohio ruled on the newspaper's action and granted a writ of mandamus compelling Miami to provide certain of the UDB records requested by the newspaper. 79 Ohio St. 3d 168 (1997). In so ruling, the Supreme Court of Ohio noted that "we believe that we are following the dictates of R.C. 149.43, which is to foster openness and to encourage the free flow of information where it is not prohibited by law." 79 Ohio St. 3d at 172. Accordingly, the Supreme Court of Ohio ordered Miami to disclose to the newspaper records of UDB proceedings that only reflected "the general location of

the incidents, the age and sex of the students (which do not identify the student), the nature of the offense and the type of disciplinary penalty imposed." 79 Ohio St. 3d at 172. The Supreme Court of Ohio did not, however, require Miami to disclose records of the UDB proceedings that contained any personally identifiable information.

On September 19, 1997, Miami filed a motion with the Supreme Court of Ohio seeking a stay of enforcement of that court's order granting the writ of mandamus, and on October 8, 1997 Miami filed its petition for a writ of certiorari in this Court. On October 15, 1997 the Supreme Court of Ohio ordered that the motion for a stay of execution of the writ be denied.

Miami asserts in its petition for certiorari that compliance with the order of the Supreme Court of Ohio granting the writ of mandamus: (1) threatens Miami with the loss of federal funding; (2) contributes to a confusing "patchwork of state court opinions" applying FERPA in the context of state public records requests; and (3) risks violation of the constitutional privacy rights of students. Contrary to Miami's assertions, the decision and order of the Supreme Court of Ohio has not decided any important federal question in a way that conflicts with a decision of any other state court of last resort or of any United States court of appeals; nor does the Supreme Court of Ohio decision raise any important question of federal law that requires resolution by this Court. *Rules of Supreme Court, Part III, Rule 10(b)(c).* Indeed, the decision and order of the Supreme Court of Ohio represents a narrow ruling on a state public records law that carries authoritative weight only among institutions of higher education in the state of Ohio. For these reasons and those discussed in greater detail below, the petition should be denied.

ARGUMENT

I.

THERE IS NO CONFLICT AMONG COURTS

The rules of this Court provide that a petition for a writ of certiorari can be granted where a petition evidences that there exists a clear conflict of opinion among state supreme courts or United States courts of appeal on an important question of federal law. *Rules of Supreme Court, Part III, Rule 10(b)(c).* Miami does not cite to any decision by another state court of last resort or federal court of appeals that conflicts with the decision of the Supreme Court of Ohio. In fact, the only other decision by a state supreme court mentioned in Miami's petition is *Red & Black Publishing Co. v. Board of Regents of University System of Georgia*, 262 Ga. 848, 427 S.E. 2d 257 (1993). In *Red & Black*, the Georgia Supreme Court concluded that FERPA does not bar the release of records of campus disciplinary proceedings. The Georgia Supreme Court determined that records of violation of student rules and regulations are similar to law enforcement records that are specifically exempted from the protection of FERPA. 427 S.E. 2d at 261; 20 U.S.C. § 1232g(a)(4)(6).

Given the paucity of decisions by state courts of last resort applying FERPA in the context of state public record laws, and the total absence of any federal appellate decisions cited by Miami, there is no "patchwork" of opinions requiring this Court's review. The petition should be overruled on this ground.

II.

THE STATE COURT DECISION DOES NOT RAISE ANY IMPORTANT FEDERAL ISSUE OF LAW

A. The Petition Misrepresents The Controversary Giving Rise To The State Court Order.

Miami states in its petition that the newspaper broadly requested "all records kept by Miami University reflecting the disposition of cases of student misconduct by the UDB during the academic years, 1993-94, 1994-95, 1995-96." (Petition, pg. 4.) According to Miami, therefore, the newspaper's demand for public records took no account of any legitimate privacy interests or restrictions, whether imposed by state or federal law, that might attach to the records in question. Miami so characterized the newspaper's request for records as indiscriminate and unconditional in nature in an attempt to bootstrap its argument that the Ohio Supreme Court's order violated FERPA's strictures regarding the release of education records containing personally identifiable information concerning students.

Miami's characterization of the newspaper's demand for records under R.C. 149.43 is entirely misleading. The newspaper's original demand made clear that Miami was not being required to provide any personally identifiable information such as a student's name, social security number, or student identification number. By eliminating its request for public records in that manner, the newspaper was careful to steer a course that avoided any encroachment upon areas of privacy staked out for protection by FERPA.

This misleading characterization by Miami of the newspaper's demand for records is significant because it reveals that Miami's claimed basis for the petition, to wit; the vindication of the privacy interests of FERPA, is disingenuous at best.

B. The Petition Misstates The Position Of The DOE With Respect To The University's Compliance With The Writ.

A review of the petition would leave the reader to believe that Miami is under considerable pressures, exerted by the Department of Education (DOE), not to comply with the order of the Ohio Supreme Court. According to Miami, it is confronted with a "Hobson's choice." As posited by Miami, the university can follow the mandate of FERPA and withhold the documents ordered to be released or it can comply with the order of the Ohio Supreme Court and subject itself to the wrath of the DOE. (Petition, pg. 14.) This argument is founded upon a dilemma that is solely of Miami's making.

Miami is not under any directive or pressure not to comply with the writ. Indeed, the DOE has expressly stated that "Miami may disclose information from the record of the UDB proceedings to The Miami Student, as ordered by the Ohio Supreme Court." According to the DOE, the Ohio Supreme Court's "order does not conflict with FERPA because the court did not order the release of personally identifiable information." (Appendix A at 6a). The DOE clearly recognizes that Miami's compliance with the narrowly drafted order of the state court does not threaten a violation of FERPA or subject Miami to the loss of any federal funding.

C. The Petition Misrepresents The Existence Of An Irreconcilable Conflict Between State And Federal Law.

Miami's petition represents that the decision by the state court threatens the undoing of FERPA, a federal scheme of legislation, which is intended to protect the legitimate privacy interests of students attending institutions of higher education receiving federal assistance. Miami claims that the state court's decision which holds that records of UDB proceedings do not constitute "education records" within the purview of FERPA, "clearly contravenes FERPA's stated purpose — the protection of student's rights to privacy in their educational records." (Petition, pg. 12.)

In actuality, the limited decision of the Supreme Court of Ohio, compelling the release of records that have been broadly redacted so as to delete personally identifiable information, poses no threat to the legitimate privacy interests of any student or to the financial interests of educational institutions receiving federal funding under the aegis of the DOE. Even if Congress intended that the UDB records be considered "education records" for the purposes of FERPA, the newspaper's request for records, as well as the state court's order, necessarily avoided any clash between state and federal law. According to the federal law, an education record may be disclosed without a student's prior written consent when the release of these documents does not disclose personally identifiably information from a student's file. 34 C.F.R. § 99.30(a). In this case, the newspaper did not request, and the state court did not order, the disclosure of any records containing personally identifiable information. 79 Ohio St. 3d at 172. Thus, even if the Ohio Supreme Court misinterpreted FERPA with regard to the definition of "education records," as the Miami claims, that aspect of the state court's decision was not essential to the issuance of the writ. No matter how FERPA is interpreted, Miami's compliance with the writ cannot violate the terms of FERPA because the disclosures ordered by the Ohio Supreme Court will not contain any personally identifiable information.

Moreover, the terms of FERPA specifically contemplate the release of education records pursuant to valid state court orders. FERPA provides that when education records, otherwise protected by the Act, are released by an institution pursuant to a state court order, that institution is exempted from the imposition of any administrative sanctions. 20 U.S.C. § 1232(g)(b)(2)(B); 34 C.F.R. § 99.31(a)(9). The state court decision, therefore, is in complete harmony with the provisions of FERPA. In these circumstances, no actual conflict between state and federal laws will arise if Miami complies with the order of the Ohio Supreme Court.

D. The Petition Fails To Identify The Existence Of An Actual Case And Controversy.

Miami has attempted to prop up its argument in support of the petition on the strength of public records request for UDB records made by organizations that were not parties to this litigation. (Petition, pg. 7, Appendix C.) It is fundamental to our system of jurisprudence that the judicial power of the federal courts is constitutionally restricted to "cases" and "controversies." *Flast v. Cohen*, 392 U.S. 91, 95, 88 S. Ct. 1942, 1949 (1968). The words "cases" and "controversies," are intended to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 96, 88 S. Ct. at 1950.

Moreover, the Rules of the Supreme Court limit this Court's review of petitions for certiorari to facts appearing in the record. Supreme Court Rule 26, Paragraph 1. In its Petition, Miami attempts to manufacture a case and controversary by referring to correspondence it received after the Supreme Court of Ohio had granted the writ (*see* Petition, Appendix C). In light of these guiding principles, this Court should not accept jurisdiction in this case to review a narrow state court order vindicating a state public records law on the basis of a theoretical dispute between theoretical litigants that may or may not ever ripen into a matter of federal jurisdiction.

REASONS FOR DENYING THE WRIT

The writ of mandamus issued by the Supreme Court of Ohio compelling Miami to produce various UDB records, that do not contain personally identifiable information, neither threatens nor creates a conflict between federal and state laws. The state court's order constitutes a limited ruling on a request made

strictly pursuant to a state public records law for the production of documents prepared by a state agency. (O.R.C. § 149.43.) Miami's compliance with the ruling of the state court order by Miami will not implicate any federal interest or rights. Indeed, even the DOE, the federal agency charged with administering FERPA, acknowledges that Miami can safely comply with the state court order without running afoul of FERPA. The decision of the Ohio Supreme Court was a proper application of state law. Contrary to the University's argument, denial of the petition will in no way contribute to a "patchwork of state opinions" that will undermine the purposes of FERPA.

Furthermore, Miami's compliance with the order of the Ohio Supreme Court will not impinge upon any constitutional rights of privacy belonging to any student. Whatever the boundaries and contours of the constitutional right of privacy belonging to a student at a public institution of higher education, those boundaries and contours cannot be extended so liberally as to encompass even the disciplinary records of official proceedings of a state agency that contain no more than the age and gender of students, the date, location and nature of incidents and descriptions of any penalties imposed. Thus, given its limited range and scope, the order of the Ohio Supreme Court presents no federal or constitutional issues that call for this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARC D. MEZIBOV
Counsel of Record
SIRKIN, PINALES, MEZIBOV
& SCHWARTZ
Attorneys for Respondent
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202-2776
(513) 721-4876

APPENDIX A — AFFIDAVIT AND ATTACHMENT OF DR. JAMES C. GARLAND DATED SEPTEMBER 16, 1997

STATE OF OHIO :
: SS
COUNTY OF BUTLER :

I, Dr. James C. Garland, being first duly sworn and cautioned, hereby state as follows:

1. I am the President of Miami University, Oxford, Ohio;

2. In August, 1997, I received a letter from Mr. LeRoy S. Rooker, Director of the Family Policy Compliance Office of the United States Department of Education;

3. A true and accurate copy of that letter is attached hereto as Attachment 1.

Further affiant sayeth naught.

s/ James C. Garland
Dr. James C. Garland

Sworn to before me and subscribed in my presence this 16th day of September, 1997.

s/ D.E. Deahl
Notary Public, Butler County, Ohio
Commission Expires: February 2, 2002

Appendix A

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

AUG 7 1997

Dr. James C. Garland
President
Miami University
200 Roudebush Hall
Oxford, Ohio 45056

Re: *The Miami Student, et al. v. Miami University, et al.*
Supreme Court of Ohio, No. 96-1596

Dear Dr. Garland:

This is in response to the July 21, 1997, letter from Ms. Robin L. Parker, General Counsel, Miami University (Miami or the University). In her letter, Ms. Parker informed the Family Policy Compliance Office (FPCO) in the U.S. Department of Education, as required by 34 CFR § 99.61, that due to the ruling in the above cited case and potential conflict with Ohio law, the University may be unable to comply with the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99.

On July 9, 1997, the Supreme Court of Ohio ruled that because University Disciplinary Board (UDB) proceedings are "nonacademic in nature," "university disciplinary records are not 'education records' as defined by FERPA." In her letter, Ms. Parker noted that, as a result of the ruling, under the Ohio Public Record Act, records pertaining to on-campus disciplinary proceedings at Miami and other public universities must be made available for public inspection and copying.

Appendix A

In several phone calls with Department officials, Ms. Parker informed the FPCO that, subsequent to the ruling, *The Chronicle of Higher Education* has requested from the University "copies of records of all disciplinary proceedings handled by the University's internal judicial system for calendar years 1995 and 1996." It is our understanding that the *Chronicle* has made the same request to other public universities in Ohio.[1] In addition, we also understand that the University has received a similar request from the *Cincinnati Enquirer*.

As you are aware, FERPA is a Federal law that protects a student's privacy interest in his or her "education records" and generally prohibits the disclosure of education records, "or personally identifiable information contained therein," without the consent of the student.[2] 20 U.S.C. § 1232g(b)(1). The term "education records" is broadly defined as all records, files, documents and other materials which:

> contain information directly related to a student; and are maintained by the educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); *see also* 34 CFR § 99.3 "Education records." FERPA does not list, identify, or single out any particular types of documents as "education records." The only types of student records excluded from the definition of education records are records specifically listed by the statute

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1. The Department is also sending this letter to other public universities who may have received a request from the *Chronicle* or another newspaper.

2. On the elementary and secondary level, the rights afforded by FERPA belong to a student's parents.

such as law enforcement unit records. Thus, records of campus disciplinary proceedings taken against students accused of misconduct, including those of a criminal and non-academic nature, are education records under FERPA because they are directly related to one or more students and are maintained by an educational agency or institution.

FERPA prohibits the nonconsenual disclosure of personally identifiable information derived from education records, except in certain statutorily specified circumstances. 20 U.S.C. § 1232g(b); 34 CFR § 99.31. There are 13 statutory exceptions to the prohibition that personally identifiable information from education records may not be released without consent. However, the FERPA statute does not include an exception for the public disclosure of student disciplinary records. Accordingly, these records may not be disclosed without the prior written consent of the student or students about whom the records relate. 20 U.S.C. § 1232g(b)(1) and (d). *See also* 34 CFR § 99.30.

Once it has been determined that a document constitutes an "education record" (i.e., it contains information directly related to a student and is maintained by the school), that document may not be released without consent of the student, and personally identifiable information may not be extracted from that document and released without consent. "Personally identifiable information" includes, but is not limited to, the following information:

(a) the student's name;

(b) the name of the student's parent or other family member;

(c) the address of the student or the student's family;

(d) a personal identifier, such as the student's social a security number or student number;

(e) a list of personal characteristics that would make the student's identity easily traceable; or

(f) other information that would make the student's identity easily traceable.

34 CFR § 99.3, "Personally Identifiable Information."

FERPA does not specifically define "easily traceable" and whether or not the release of information might be considered easily traceable must be analyzed on a case by case basis. For instance, schools need to ensure that disclosure of information on a particular subgroup, such as race, would not permit the possible identification of individual students when compared with other subgroups. In sum, if a school reasonably believes that a release of information would make the student's identity "easily traceable," then the school should not disclose the information to the requesting party.

Although the Supreme Court of Ohio stated that student disciplinary records are not "education records" protected by FERPA, the Department believes that this ruling is wrong as a matter of law. However, the court did not order the University to disclose information from disciplinary records in personally identifiable form.[3] Instead, the court stated:

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3. Under FERPA, information from an education record may be disclosed without the student's prior written consent pursuant to a lawfully

(Cont'd)

Appendix A

> . . . , in accordance with relator's request, Miami University may delete from the UDB records the student's name, Social Security Number, and student identification number. The exact date and time of the alleged incident may also be deleted, since this constitutes other information that may lead to the identity of the student. The university must disclose, however, the general location of the incident, the age and sex of the student (which does not identify the student), the nature of the offense, and the type of disciplinary penalty imposed.

In our view, this order does not conflict with FERPA because the court did not order the release of personally identifiable information from the disciplinary records. We therefore remind the University of its obligations to comply with FERPA's requirements. Thus, you may comply with court's ruling without violating FERPA as long as personally identifiable information (including information that you believe to be easily traceable to a student) is not disclosed from education records. If a requestor such as the *Chronicle of Higher Education* or the *Cincinnati Enquirer* insists that the University provide information in personally identifiable form and the University intends to comply with the request, we ask that you contact the Department immediately.

(Cont'd)
issued subpoena or court order. 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9). Accordingly, Miami University may disclose information from the records of the UDB proceedings to *The Miami Student*, as ordered by the Ohio Supreme Court. Because the order does not require the release of personally identifiable information from the student's records, the University does not have to make a "reasonable effort to notify" the student as provided for in 34 CFR § 99.31(a)(9)(ii).

Further, we suggest that this potential conflict between FERPA and Ohio law should be brought to the attention of appropriate State officials as soon as possible. The Department will, of course, offer any help we can in assisting State officials. For this reason, we are sending a copy of this letter to Governor Voinovich and Attorney General Montgomery. Please do not hesitate to contact the FPCO at the address listed below if you have any questions on FERPA or if we can provide additional assistance:

Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605
(202) 260-3887

Sincerely,

s/ LeRoy S. Rooker
LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Honorable George Voinovich
Governor

Honorable Betty D. Montgomery
Attorney General

Dr. Elaine H. Hairston
Chancellor
Ohio Board of Regents

Dr. John M. Goff
Superintendent of Public Instruction

Appendix A

Dr. Marion Ruebel
President
University of Akron

Dr. Sidney A. Ribeau
President
Bowling Green State University

Mr. John W. Garland, Esq.
President
Central State University

Dr. Joseph A. Steger
President
University of Cincinnati

Dr. Claire Van Ummersen
President
Cleveland State University

Dr. Carol A. Cartwright
President
Kent State University

Dr. E. Gordon Gee
President
The Ohio State University

Dr. Robert Glidden
President
Ohio University

Appendix A

Dr. Clive Veri
President
Shawnee State University

Dr. Frank E. Horton
President
University of Toledo

Dr. Harley Flack
President
Wright State University

Dr. Leslie Cochran
President
Youngstown State University

Ms. Robin L. Parker
General Counsel
Miami University

(3)

MOTION FILED

NOV 6 1997

No. 97-606

In The
SUPREME COURT OF THE UNITED STATES
October Term 1997

MIAMI UNIVERSITY,

Petitioners,

vs.

STATE OF OHIO, *ex rel. The Miami Student,*

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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MOTION OF OHIO PUBLIC UNIVERSITIES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Counsel for Ohio's Public Universities

4 pp

Pursuant to Rule 37 of the Rules of this Court, this motion for leave to file an *amicus curiae* brief in support of the petition for a writ of certiorari is presented to this Court by *amici* Ohio public universities.[1] Counsel for the Petitioner has consented to the filing of the brief *amicus curiae*. Counsel for Respondent has refused to consent to the filing of the brief *amicus curiae* thereby necessitating the filing of this motion.

Ohio's public universities represent twelve (12) state universities and two (2) free-standing "medical colleges".[2] Approximately 280,000 students were enrolled at these universities during the 1996-97 academic year. Ohio's public universities assert that this matter raises important and critical issues for not only petitioner but all of Ohio's universities and their students

In particular, public universities in Ohio believe it is critical that this Court provide some clarification to what is an "educational record" under the Family Educational Right to Privacy Act ("FERPA"). The Ohio Supreme Court is of the opinion that pursuant to the Ohio public records statute (Ohio Rev. Code § 149.43), a student's disciplinary record is not an education record while the U.S. Department of Education contends that such records are in fact education records. The

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[1]As required by Rule 37.6, counsel of record discloses that at the request of the other fourteen (14) universities, Miami University assisted in providing monetary support for the preparation of the *amicus curiae* brief and that counsel authored the brief *amicus curiae* filed on November 6, 1997 in part and with assistance of legal counsel for those other fourteen (14) universities.

[2]The fourteen (14) public universities and medical colleges include the following: University of Akron, Bowling Green State University, Central State University, Cleveland State University, University of Cincinnati, Kent State University, Medical College of Ohio, Miami University, Northeastern Ohio Universities College of Medicine, The Ohio State University, Ohio University, Shawnee State University, University of Toledo, Wright State University, and Youngstown State University.

conflicting views of the Ohio Supreme Court and the U.S. Department of Education have now put the State's universities in a precarious legal position.

Pursuant to the Department of Education's regulations, a university or college that does not comply with FERPA may have its eligibility to receive funding terminated. 34 C.F.R. § 99.67 (1996). For the 1995-96 academic year alone, the public universities in Ohio received over $719 million dollars in federal student financial aid programs from the U.S. Department of Education. Given the millions of dollars in financial support that Ohio's public universities receive from the federal government and the loss of such dollars which may result if these same institutions are forced to violate FERPA and comply with the Ohio Supreme Court decision, the universities believe their participation in this case will assist the Court in better understanding and resolving an important federal issue at stake in this case.

Moreover, it is the release of education records without the student's consent that Congress apparently was attempting to avoid by enacting FERPA. FERPA's legislative history demonstrates an express Congressional intent to protect the privacy of education records. *See Joint Statement in Explanation of Buckley/Pell Amendment, supra* at 39,862.

In addition, should there not be some clarification as to the interpretation of FERPA and Ohio law, Ohio's public universities will likely find themselves battling with their students in the courtroom. Under 42 U.S.C. § 1983, students may assert a claim for the deprivation of their rights under the Act. Given the Ohio Supreme Court decision, all of Ohio's public universities have now been placed in the position of having to defend against actions brought by students under 42 U.S.C. § 1983. Ohio's public universities, therefore, not only risk the loss of millions of dollars in federal funding but they

also face the possibility of being sued by their own students alleging that their federal rights under FERPA have been violated. As such, the universities' participation in this case is critical to understanding the various ramifications of the Ohio Supreme Court decision and the requirements of FERPA on Ohio's public institutions of higher education.

For all the foregoing reasons, Ohio Public Universities respectfully requests that this Court grant this motion for leave to file the brief *amicus curiae* in support of Petitioner's writ of certiorari.

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November 14, 1997